ONG KONG LAI & ANOR

v.

ABDUL RAZAK NAZAHDIN & ORS & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[ORIGINATING SUMMONS NOS: D5-24-241-2006 & D1-24-243-2006]
1 AUGUST 2007

COMPANY LAW: *Winding-up - Priorities - Claims of unsecured creditors against claims of secured creditor - Attempt by unsecured creditors to create implied trust over monies owing to them*

SALE OF GOODS: *Goods sold and delivered - Action for - Buyer in liquidation - Whether legal title to goods have passed - Whether seller a mere unsecured creditor - Whether seller has priority of claim over debenture holder - Whether seller still has interest in sold goods which justifies creation of a trust over sale proceeds - Effect of retention of title clause*

TRUSTS: *Company - Winding-Up - Concessionaires and consignors agreements - Liquidation - Whether proceeds of sale subject to implied trust clause - Whether sale of goods - Vendor/purchaser or bailor/bailee relationship - Intention of parties - Mixing of funds - Whether traceable - Burden and onus of proof - Some agreements contained express retention of title clause*

On 2 March 2005, Pasaraya Hiong Kong Sdn. Bhd ('PHK') was wound up by an order of court. Thereafter, liquidators were appointed over PHK and the liquidators took over conduct and control of the management of PHK for the purposes of winding up PHK. Later, on 23 November 2005, the Receivers and Managers ('R&M') were appointed over PHK by Malaysian Trustees Berhad ('MTB'), pursuant to the powers contained in the debenture dated 11 July 2002. The R&M then notified the liquidators of their appointment and instructed them to, *inter alia*, hand over all properties and assets belonging to PHK. On the other hand, the 3rd to 29th defendants in the liquidators' application notified the liquidators of various claims allegedly due by PHK to them pursuant to certain consignment/concessionaire agreements entered into between each of them with PHK. They

A alleged that monies were being held by PHK in trust for each of them. The 3rd to 29th defendants claimed a collective sum of RM13,403,164,34 as trust monies due to them by PHK and the liquidators were unable to verify all the claims alleged based on the documents availed to them. Interpleader applications were filed by
B the liquidators and by HSBC Bank Malaysia Berhad ('HSBC'). The liquidators' application pertained to a sum of RM1,374,223.19 held by them which was subject to competing claims by the R&M and the 3rd to 29th defendants. In HSBC's application, HSBC identified a total sum of RM126,536.91 as being held by them for
C PHK and HSBC cited competing claims made, on one part, by the liquidators and on the other, by the R&M. MTB was subsequently added as a party to both interpleader applications in place of the R&M.

D **Held:**

(1) To support their claims that the Disputed Monies were monies held on trust for them, the 3rd-29th defendants had to show the following: (a) that each of them had a consignment
E agreement for supply of goods to PHK; (b) that goods were supplied to PHK; (c) that the goods were sold by PHK and PHK did not pay them; (d) that the proceeds of sale of these specific goods formed part of the Disputed Monies; and (e) that a trust existed in relation to these sale proceeds. Little
F or no evidence had been shown by the 3rd-29th defendants to support their claims. (para 35)

(2) There was no retention of title clause found in the 6th and 12th defendants' alleged consignment agreements with PHK. Thus, legal title to the goods would have passed to PHK and
G therefore these creditors could not claim the goods as trust goods. All that the creditors had was an unsecured debt due from PHK for goods sold and delivered. MTB as debenture holder, had priority to the Disputed Monies as secured creditor. (paras 33 & 34)

H

(3) In relation to the 13th, 15th and 17th defendants, it was provided in their respective alleged consignment agreements with PHK that the title to the goods consigned to PHK remained in them until such time as the said goods had been
I sold and delivered to purchasers thereof. Thus, when the said goods were sold and delivered to purchasers, they no longer had any interest in the sold goods which justified the creation

of a trust over the sale proceeds of these goods in their favour. In addition, PHK was entitled to deduct from the sale proceeds, *inter alia,* rental before remitting the same to the 13th, 15th and 17th defendants. Therefore it could not be alleged that all the sale proceeds of the goods would belong to the 13th, 15th and 17th defendants and that these be kept in trust for them. (paras 36, 37 & 38)

(4) The 13th, 15th and 17th defendants also failed in their claims because the mere fact of the retention of title clause did not give them any better rights than that of unsecured creditors as compared to MTB's right as secured creditor with a charge over the Disputed Monies. (para 39)

(5) In the absence of an express trust provision and a stipulation that the monies be kept in a separate account and the fact that there may have been ongoing trade for years between the parties, no trust could in fact and in law be imputed to a specific sum as represented by the Disputed Monies. (para 45)

(6) Insofar as the liquidators' claim was concerned, they were seeking to maintain their claim based on the unsecured creditors' claims and the court had already established that the unsecured creditors' claims had no merit *vis-à-vis* MTB, as secured creditor. The liquidators' claim was dismissed outright. (para 62)

(7) MTB was a secured creditor while the 3rd-29th defendants as well as HSBC were unsecured creditors in relation to the assets of PHK. Therefore, MTB's claim prevailed. MTB was entitled to all the Disputed Monies held by the liquidators and HSBC in both the applications. (para 74)

Case(s) referred to:

Clayton's Case [1816] Mer 572 ***(refd)***

Good Property Land Development Pte Ltd (In Liquidation) v. Societe-Generale [1996] 2 SLR 239 ***(refd)***

Henry v. Hammond [1913] 2 KB 515 ***(refd)***

Hilev v. Peoples Prudential Assurance Co Ltd (In liquidation) [1938] 60 CLR 468 ***(refd)***

Hinckley Singapore Trading Pte Ltd v. Sogo Department Store(s) Pte Ltd (Under Judicial Management) [2002] 4 SLR 154 ***(refd)***

Kav Hian & Co (Pte) v. Jon Phua Ooi Yong & Ors [1989] 1 MLJ 284 ***(refd)***

A *Kirkham v. Peel [1880] 43 LT 171* ***(refd)***
Lesco Development Corp Sdn Bhd v. Malaysian Building Society Bhd [1988] 2 MLJ 184 ***(refd)***
Re Andrable Ltd (in liquidation) Airborne Accessories Ltd v. Goodman [1984] 3 All ER ***(refd)***
B *Re Bond Worth Ltd [1979] 3 WLR 629* ***(refd)***
Re Diplock's Estate [1948] h 465 ***(refd)***
Sime Diamond Leasing (Malaysia) Sdn Bhd v. JB Precision Moulding Industries Sdn Bhd [1998] 4 CLJ 557 FC ***(refd)***
Tan Kim Khuan v. Tan Kee Kiat (M) Sdn Bhd [1998] 1 CLJ Supp 147 HC ***(refd)***
C *Walker v. Corbov [1990] 19 NSWLR 382* ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 41(1)
Evidence Act 1950, ss. 101, 102, 103

D *For the liquidators - Gregory Ling; M/s Ranjit Ooi & Robert Low*
For the 3rd-29th defendants - KL Wong; M/s Wong Kam Leong & Partners
For MTD - CY Kong; M/s Shook Lin & Bok
For HSBC - Sathia Kumardass; M/s Shearn Delamore & Co

E *Reported by Amutha Suppayah*

JUDGMENT

Ramly Ali J:

F **[1]** These grounds of judgment are in respect of interpleader applications filed by the liquidators over Pasaraya Hiong Kong Sdn. Bhd. (in liquidation) (PHK) *vide* Originating Summons No: D5-24-241-2006 (liquidators' application); and another application filed by HSBC *vide* Originating Summons No: D1-24-243-2006 (HSBC's application).

[2] Both the liquidators' application and the HSBC's application are interpleader applications, filed in respect of competing claims made against them *vis-à-vis* assets held by them, belonging to H PHK:

(a) the liquidators' application pertains to a sum of RM1,374,223.19 currently held by the liquidators ("Liquidators' Stake Monies"), which is subject to competing claims by, on one hand, the I receivers and managers appointed over PHK (the 1st and 2nd defendants therein and 3rd and 4th claimants in HSBC's Application) ("R&M") and on the other, by the 3rd to 29th defendants therein; and

(b) in the HSBC's application, HSBC identified a total sum of RM126,536.91 as being held by them for PHK ("HSBC's Stake Monies") and HSBC cited competing claims made, on one part, by the liquidators (as the 1st and 2nd claimants therein) and on the other, by the R&M (as 3rd and 4th claimants) therein.

[3] Subsequently, Malaysian Trustees Berhad ("MTB"), who had entered into a debenture dated 11 July 2002 with PHK, to which the R&M were appointed, applied for and were subsequently added as a party to both interpleader applications (as the 30th defendant of the liquidators' application and the 5th claimant in HSBC's application), to take over conduct and to continue the claims in place of the R&M in both interpleader applications.

[4] Both the liquidators' application and HSBC's application have been consolidated pursuant to an order granted by this court on 27 September 2006.

Factual Matrix In Respect Of Both Applications

[5] On 2 March 2005, PHK was wound up by an order of court *via* winding up proceedings presented in the Kuala Lumpur High Court Companies Winding Up No. D3-28-882-2004 ("Winding Up Court"). Thereafter, by an order of the Winding Up Court on 9 August 2005, the liquidators were appointed over PHK. Thereafter, the liquidators took over conduct and control of the management of PHK for the purposes of winding up PHK.

[6] Later, on 23 November 2005, Abd Razak bin Nazahdin and Khoo Pek Ling were appointed as the R&M over PHK by MTB, pursuant to the powers contained in the debenture dated 11 July 2002. By a letter dated 25 November 2005, the R&M notified the liquidators of their appointment and instructed them to, *inter alia*, hand over all properties and assets belonging to PHK. This invariably would include the Liquidators Stake Monies.

[7] On the other hand, by various letters issued between the months of February to April 2006, the 3rd to 29th defendants (in the liquidators' application) wrote to the liquidators placing them on notice of various claims allegedly due by PHK to them pursuant to certain consignment/concessionaire agreements entered into between each of them with PHK. They then alleged into the said letters that monies were being held by PHK in trust for each of them ("Trust Monies").

[8] These 3rd to 29th defendants ("Alleged Trust Creditors") then sought the liquidators to take steps to, *inter alia*, prepare accounts to trace their respective Trust Monies and investigate into the affairs of PHK. Pursuant to the abovementioned letters, the Alleged Trust Creditors are claiming a collective sum of RM13,403,164,34 as trust monies due to them by PHK. This claim was later stated as amounting to RM16,461,241.03 to which the liquidators are unable to verify all the claims alleged based on the documents availed to them.

[9] Meanwhile in respect of HSBC's application, the R&M requested HSBC, by letters dated 23 January 2006 and 14 March 2006, to freeze all accounts and requested for details and the status of all accounts of PHK held by it.

[10] By a letter dated 20 April 2006, HSBC wrote to the liquidators to request confirmation that HSBC could act upon the requests made by the R&M in respect of the HSBC Stake Monies in its possession. By a letter dated 26 April 2006, the liquidators requested that the HSBC Stake Monies be instead released to them (the liquidators).

[11] Several letters were later exchanged between solicitors for HSBC, the liquidators and the R&M on the HSBC Stake Monies:

(a) In respect of the liquidators' position, they stated through their solicitors, that they had received competing claims in respect of monies held by them from the Alleged Trust Creditors (3rd- 29th defendants). As it appeared that the HSBC Stake Monies could also fall within the ambit of the claim by the Alleged Trust Creditors by reason of the nature of the account held by HSBC, a request was made that HSBC release the HSBC Stake Monies to the liquidators to be held by them pending the resolution of the competing claims between the R&M and the Alleged Trust Creditors; and

(b) in respect of the R&M's position, they continued to maintain that they were entitled to possession and control of the PHK's assets including the HSBC Stake Monies.

[12] By a consolidation order on 27 September 2006 made by the Kuala Lumpur Commercial Court No. 1 (where HSBC's application was originally filed), the two (2) interpleader applications were consolidated to be heard together before this court.

[13] By an order of court on 15 March 2007, MTB was added as the 30th defendant and 5th claimant in the respective interpleader applications to take over conduct of the claim in place of the R&M.

[14] By a writ of summons and statement of claim dated 15 October 2006, thirty four (34) consignors (including the Alleged Trust Creditors) a separate suit filed *vide* the KLHC Civil Suit No. D7-22-1823-2006, against Affin.

Competing Claims

[15] Although HSBC's Application identified the claimants to be either the liquidators or the R&M (now MTB), the competing claims are ultimately between MTB and the Alleged Trust Creditors (3rd-29th defendants), as it appears in the liquidators' application.

[16] The liquidators make no direct claim to the HSBC Stake Monies. They had requested HSBC to release the HSBC Stake Monies to them not for themselves, but rather, to be held by them so that they could interplead the same together with the Liquidators' Stake Monies in the Liquidators' Application. As plainly set out in its solicitors' letter dated 22 May 2006, they intended to hold the monies pending the resolution of the competing claims between the R&M and the Alleged Trust Creditors. This resolution would have come from the determination of the liquidators' application.

[17] Accordingly, both interpleader applications should be treated as being in respect of competing claims on one hand, by MTB and on the other, by the Alleged Trust Creditors. This is fortified by the granting of the consolidation order by court on 27 September 2006 by the Kuala Lumpur High Court (Commercial Court No.1) as it was recognised that both interpleader applications dealt with the same issues and facts.

Claim By MTB

[18] It appears that PHK had earlier issued secured commercial papers (CPs) and medium terms notes (MTNs) to the aggregate principal limit of RM120,000,000 and Affin Discount Berhad (having now transferred and vested all its businesses, assets and liabilities into Affin Investment Bank as at 1 July 2006 ("Affin") was the sole holder of the said CPs and MTNs. MTB was appointed as the Security Trustee to hold security granted by

PHK to secure its obligations to Affin in respect of the aforesaid commercial papers and medium term notes. To secure its obligations, PHK executed a debenture dated 11 July 2002 in favour of MTB, under which fixed and floating charges were created upon PHK's assets.

[19] After the R&M were appointed, they demanded from the liquidators and HSBC that they (the liquidators and HSBC), *inter alia*, release PHK's assets to them (which included the liquidators' Stake Monies and HSBC's Stake Monies).

[20] During the course of the present proceedings, MTB and the receivers and managers have agreed that it would be desirable if the receivers and managers ceased to act and MTB, as the debenture holder and the secured creditor having the benefit of the charges over the assets of PHK, takes over the conduct of these proceedings as a claimant to the subject monies from the receivers and managers. Hence, the order of court dated 15 March 2007 was obtained whereby MTB has been made a party in the suits and is taking over the claim in place of the receivers and managers.

[21] It is not disputed that MTB is a debenture holder, having a charge over the assets of PHK. In this respect, this will include the Liquidators' Stake Monies as well as the HSBC's Stake Monies. In short, MTB is a secured creditor as far as PHK's assets are concerned.

[22] As secured creditor, therefore, MTB's claim to the Disputed Monies must prevail unless any of the other claimants can set up a better claim in priority to MTB's.

[23] The other claimants to the Disputed Monies are the 3rd-29th defendants (in the liquidators' applications). (They are the Alleged Trust Creditors). The court shall now examine the status of the 3rd-29th defendants in relation to the Disputed Monies and determine whether they have a priority or better claim over MTB in respect of the monies.

Claim By The 3rd-29th Defendants

[24] The 3rd-29th defendants allege that they had each entered into consignments and/or concessionaire agreements with PHK respectively for the sale of their goods in various supermarkets of PHK. They claim that the sale proceeds of these goods collected

by PHK is owned by them and deemed to be held on trust by PHK and that the alleged trust can be traced to the Disputed Monies, making them trust monies.

[25] To support their claims that the Disputed Monies are monies held on trust for them, they have to show to this court the followings:

(a) that each of them has a consignment agreement for supply of goods to PHK;

(b) that goods were supplied to PHK;

(c) that the goods were sold by PHK and PHK did not pay them;

(d) that the proceeds of sale of these specific goods formed part of the Disputed Monies; and

(e) that a trust exists in relation to these sale proceeds.

[26] It is glaringly obvious that very little or no evidence has been shown by the 3rd-29th defendants to support their claims. Except for the 6th, 12th, 13th, 15th, and 17th defendants whose consignment agreements are exhibited in encl. 3 and encl. 6, the rest of the defendants have shown nothing to justify their claims.

[27] Of these 6th, 12th, 13th, 15th, and 17th defendants, other than their alleged consignment agreements, none of the aforesaid requirements (b) to (e) of para. 25 above were shown.

[28] Since the allegation of trust was made by them, by virtue of ss. 101, 102 and 103 of the Evidence Act 1950, the burden of proof lies on them to produce some fact or documentary evidence with regard to the particulars set out in the requirements above and the existence of the alleged trust.

[29] In *Kav Hian & Co. (Pte.) v. Jon Phua Ooi Yong & Ors* [1989] 1 MLJ 284 at 288, in an interpleader proceeding, rival claims arose between a prior chargee under a debenture and a subsequent chargee over the ownership of shares initially owned by the 2nd defendant therein which has gone into receivership. The Singapore High court held that whoever makes an assertion must prove it. As such, the receivers and managers only needed to produce the debenture which gives the debenture holders a charge. The burden of proof was thus on the subsequent chargee

who is asserting a prior encumbrance in respect of the said shares. In *Tan Kim Khuan v. Tan Kee Kiat (M) Sdn. Bhd.* [1998] 1 CLJ Supp 147, it was held that the ordinary rules relating to burden of proof apply to interpleader issues as to other proceedings. The onus of proof will rest on the claimant to show that he has a title to the goods and such onus can only be satisfied by proof of actual title in himself.

[30] In our case, all that the 3rd-29th defendants have done is to assert a claim to the monies by making a bare allegation that there are trust monies involved. However, no particulars of the same have been adduced by them and in the circumstances, they have not established any existence of a trust and/or fiduciary relationship between themselves and PHK nor that the Disputed Monies are trust monies held on their behalf.

[31] We now look further at the claims of the 6th, 12th, 13th, 15th 17th defendants, whose alleged consignments agreements have been exhibited.

[32] Even if these creditors had indeed delivered goods to PHK (for which no particulars are given or shown that they were so delivered), the court is of the view that the legal title to the said goods would have passed to PHK.

[33] In the present case, except for the alleged consignment agreements of the 13th, 15th and 17th defendants, there is no retention of title clause found in the 6th and 12th defendants' alleged consignment agreements with PHK. Thus, clearly for the 6th and 12th defendants, legal title to the goods would have passed to PHK.

[34] If legal title had passed to PHK, then these creditors cannot claim the goods as trust goods, as the title of the goods are no longer with them but with PHK. In such instance, all that the creditors have is an unsecured debt due from PHK for goods sold and delivered. These debts would have to be proven in liquidation and these creditors would then rank merely as unsecured creditors. MTB as debenture holder, therefore has priority to the Disputed Monies as secured creditor.

[35] It is also a quantum leap of logic and misconception in law to conclude that monies which are subject to MTB's debenture charge must be paid to such unsecured creditors. There was clearly no evidence shown of any express contemplation of fiduciary relationship between PHK and its unsecured creditors in connection with monies derived from the goods sold to PHK.

[36] In relation to the 13th, 15th and 17th defendants, it was provided in their respective alleged consignment agreements with PHK that the title to the goods consigned to PHK remain in them until such time as the said goods have been sold and delivered to purchasers thereof.

[37] Thus, if the 13th, 15th and 17th defendants' titles to their respective goods are relinquished when the said goods are sold and delivered to purchasers, they would no longer have any interest in the sold goods which would justify the creation of a trust over the sale proceeds of these goods in their favour.

[38] In addition, it was clear from the respective alleged consignment agreements that PHK was entitled to deduct from the sale proceeds, *inter alia*, rental before remitting the same to the 13th, 15th and 17th defendants. Based on this, it cannot be alleged that all the sale proceeds of the goods would belong to the 13th, 15th and 17th defendants and that these be kept in trust for them.

[39] In any event, these three (3) unsecured creditors (the 13th, 15th and 17th defendants) also fail in their claims for the following reasons:

(a) they have failed to establish the other facts or particulars necessary to succeed in their claims to the Disputed Monies, as outlined in para. 25 above; and

(b) the mere fact of the retention of title clause does not give them any better rights than that of unsecured creditors as compared to MTB's right as secured creditor with a charge over the Disputed Monies.

[40] In this regard, the court refers the case of *Hinckley Singapore Trading Pte. Ltd. v. Sogo Department Store(s) Pte. Ltd. (Under Judicial Management)* [2002] 4 SLR 154 which, on the facts, are very similar to our present case.

[41] In *Hinckley*'s case, the appellant sold its goods in the department store operated by the respondent under a concessionaire agreement. Customers who wanted to purchase the appellant's goods were to make payment to the cash registers in the department store. At the end of each calendar month, the respondent would give the appellant a statement of the total sale of its goods for that month. A portion of the monthly sale would be deducted and the respondent would pay the remaining equivalent to the appellant within 15 days.

[42] The Singapore Court of Appeal in *Hinkley*'s case, in following the decisions in *Henry v. Hammond* [1913] 2 KB 515 and *Kirkham v. Peel* [1880] 43 LT 171, held that in the absence of an express term creating a trust, the maintenance of a separate account by the agent is crucial to constituting the money as trust money.

(See also *Re Andrable Ltd. (in liquidation) Airborne Accessories Ltd, v. Goodman* [1984] 3 All ER at 414 to 415: No trust if there was no obligation to keep sales money separate from company's own monies; and

Re Bond Worth Ltd. [1979] 3 WLR 629 at 659: Where an alleged trustee has a right to mix tangible assets or moneys with his own other moneys, this is incompatible with the existence of a subsisting fiduciary relationship in regard to such monies.)

[43] It was also held in *Hinckley*'s case that in the absence of an express trust provision, whether a trust would be implied would depend upon the expectations of the parties in the light of the commercial context. In this respect, the Court of Appeal was of the view that although a trust may be more readily imposed on proceeds arising from an isolated transaction, the position may not be the same where property is received in the ordinary course of an ongoing trading relationship. On the facts, the Court of Appeal held that there was a business arrangement for a period of three (3) years, and the parties would have realised that it would involve the sale of a huge number of items of goods and thus it would be unrealistic to suggest that the parties expected a trust to arise in relation to the sum received in respect of each item of goods. The commercial context would mitigate against any such imputation of a trust.

(See also *Walker v. Corbov* [1990] 19 NSWLR 382 at 390: Although a trust is readily imposed on proceeds arising from an isolated transaction, it is not the same where property is received in an ongoing trading relationship. Courts are reluctant to introduce trust into commercial transactions.

[44] In our case, it is not provided in the said 13th, 15th and 17th consignment agreements that the sale proceeds were required to be kept in separate accounts or that PHK was prohibited from mixing the funds with other monies. Further, the alleged consignment agreements were executed years before the winding up of PHK (the consignment agreements were executed between PHK and the 6th defendant on 20 June 2003, the 12th defendant on 20 June 2003, the 13th defendant on 1 November 1998, the 15th defendant on 16 October 2000, the 17th defendant on 10 August 2003), which would mean that various ongoing transactions would have taken place.

[45] Accordingly, the court finds that in the absence of an express trust provision and a stipulation that the monies be kept in a separate account and the fact that there may have been ongoing trade for years between the parties, no trust can in fact and in law be imputed to a specific sum as represented by the Disputed Monies.

[46] The alleged consignment agreements of the 6th, 12th, and 17th defendants were executed after the debenture creating the charge over all PHK's assets in favour of MTB. MTB's debenture charge must, in addition to all of the above, prevail as being prior in time as well.

[47] Even if the existence of a trust over the said goods is proven (which it is not), the court is of the view that such alleged trust did not extend to cover the proceeds of sale of the said goods which allegedly form part of the Disputed Monies.

[48] The monies collected by PHK would in all probability have been dealt with and used by PHK over the years. It is also highly probable that the monies collected from sale of the goods of the 13th and 15th defendants were not retained in PHK's account nor were they part of the Disputed Monies. Again, the lack of facts and particulars on the part of these Unsecured Creditors is fatal to their claims herein.

[49] However, even if there were trust monies once held by PHK, Clayton's Rule would apply. This rule basically provides that if monies have been placed in an account from time to time and monies withdrawn subsequently from time to time from that account, it will be deemed that the first payment in will be the first payment out – the "first in first out".

(See: *Clayton*'s Case [1816] Mer 572 at 793; and

Re Diplock's Estate [1948] h 465 at 553 and 554).

[50] In our case, there is no fact shown by these Unsecured Creditors that the Disputed Monies include proceeds of sale of their goods with certainty, even if so, the alleged trust monies would have been spent or dissipated and would no longer be part of the Disputed Monies. This is true especially in the light of the fact that the alleged mixing of funds took place in PHK's active banking accounts.

[51] None of the Unsecured Creditors (including the 13th and 15th defendants) have been able to produce any evidence or to identify which portions of the Disputed Monies are such alleged trust monies. This is fatal to the Unsecured Creditors' claims.

[52] The above considerations clearly show that the relationship between the 3rd-29th defendants (as Unsecured Creditors) and PHK is purely one of debtor and creditor only which had arisen in the course of ongoing trades between them. There is no trust relationship between the parties at all.

The Unsecured Creditors' Contention That The Proceedings Herein Be Postponed

[53] The 3rd-29th Defendants (Unsecured Creditors) contend that the proceedings herein should be set down for trial and be postponed pending the disposal of Kuala Lumpur High Court Suit No. D7-22-1823-2006 ("the D7 Suit"). The D7 Suit concerns the Disputed Monies as well as a further RM7,000,000 received by Affin Investment Bank Berhad ("Affin Investment") from one Jitramas Bumi Sdn. Bhd. ("Jitramas") for the purchase of the assets of PHK.

[54] With all due respect, this contention simply cannot be sustained. From the outset, the Unsecured Creditors have not even established a valid dispute with MTB over the Disputed Monies in these proceedings to justify a trial herein. MTB has

shown good title to the Disputed Monies while the Unsecured Creditors have failed to even establish the basic facts necessary to support their claim. In the absence of any actual dispute, the Unsecured Creditors' claim must fail and there is no necessity to set this matter down for trial.

[55] Further, the D7 Suit and the issue regarding the RM7,000,000 was never raised in any of the affidavits filed in these proceedings and should be disregarded. In any event, the RM7,000,000 is irrelevant to the proceedings in the present liquidators' application and HSBC's Application.

[56] For the sake of clarification, nonetheless, in the D7 Suit, the RM7,000,000 received by Affin Investment from Jitramas were solely concerned with the sale of PHK's furniture and fittings, equipment, machinery and motor vehicles. It does not involve the sale of goods in PHK's supermarkets at all and there can clearly be no trust or dispute over these assets. The subject matter in the liquidators' application as well as HSBC's application and the D7 Suit are clearly different and any decision in the D7 Suit cannot simply be imputed in the present application. Indeed, the inclusion of the Disputed Monies in the D7 Suit lacks *bona fides*. There is totally no relation at all between the Disputed Monies and the defendant in that case (Affin).

[57] The court wish to highlight the chronology of events in relation to the present applications and the D7 Suit:

(a) The present applications were filed on 11 July 2006;

(b) Parties then proceeded to exchange affidavits. In the affidavit affirmed by Khoo Pek Ling on 14 September 2006 (encl. 5) for the liquidators' application, it was brought to the attention of the court that the unsecured creditors have failed to adduce any evidence to show the existence of a trust and, therefore, the claim would surely fail; and

(c) barely a month later, the unsecured creditors then filed their writ of summons and statement of claim dated 15 October 2006 in the D7 Suit, alleging a trust over the RM7,000,000 received by Affin Investment from Jitramas, and including the Disputed Monies in the D7 suit.

[58] From the above, it is apparent that the D7 Suit is designed to thwart MTB from obtaining the Disputed Monies which they are entitled to and to merely delay the proceedings in the present applications. Thus, the D7 Suit was belatedly filed to enable this very same argument to be raised by the unsecured creditors, that this court should defer determination of these proceedings.

[59] In any event, it should not be that these proceedings be postponed pending the outcome of the D7 Suit, as we are now already at final stage while the D7 Suit is only set for the first pre-trial case management on 24 October 2007. As the Unsecured Creditors contend that the same issues are involved, it would be ludicrous to postpone proceedings herein, which is at its final stages, pending the disposal of the D7 Suit, which may be years before it is finally disposed off.

[60] It would also be improper for these proceedings to be postponed pending the outcome of the D7 Suit for the following reasons:

(a) the D7 Suit involves an entirely different subject matter as stated above. The Unsecured Creditors rely heavily on the case of *Lesco Development Corp. Sdn. Bhd. v. Malaysian Building Society Bhd* [1988] 2 MLJ 184 to support their contention that two different courts should not determine the same issues. However, *Lesco* case only applies to where "two different courts would try and determine the same issues arising between the same parties relating to the same subject"; and

(b) again, in the case of *Lesco*, it was the later suit that was postponed pending the outcome of the earlier suit. In our case, the present applications were commenced earlier than the D7 Suit.

HSBC's Claim

[61] HSBC Bank has requested the court to determine who should be entitled to the sum of RM107,659.52 presently hold by HSBC in a suspense account. The parties with competing claims here are again MTB, who has established it has a charge over the monies by virtue of the said debenture, and the liquidators of PHK, who are only maintaining the claim due to their concerns over claims against the liquidators by the 3rd-29th defendants (unsecured creditors) in the liquidators' application for such sum of monies, again based on the alleged trust arising from sales proceeds held by PHK.

[62] Insofar as the liquidators' claim is concerned, they are seeking to maintain their claim based on the unsecured creditors' claims and the court has already established that the unsecured creditors' claims have no merit *vis-à-vis* MTB, as secured creditor. The liquidators' claim can be dismissed outright.

[63] In addition, HSBC in it's application also claims for the sum of RM18,877.39 currently held by them as loss and expenses incurred as a result of the loss of 20 units of Credit Authorisation Terminals supplied to PHK.

[64] For the sum of RM107,659.52 presently held by HSBC in the suspense account, the court reiterate that MTB, as the secured creditor by virtue of the debenture, is entitled to this sum.

[65] In respect of the right to the sum of RM18,877.39 claimed by HSBC as loss and expenses incurred as a result of the alleged loss of 20 units of Credit Authorisation Terminal, HSBC alleges that they are entitled under s. 41 of the Bankruptcy Act 1967 to this amount.

[66] For ease of reference, s. 41(1) of the Bankruptcy Act 1967 which HSBC is relying on is set out as follows:

> Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order is made under this Act and any other person providing or claiming to prove a debt under such order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account and no more shall be claimed or paid on either side respectively.

[67] Firstly, s. 41 cannot be relied on by HSBC as the monies in the suspense account are already charged to MTB and cannot therefore be considered PHK's monies which can be subject to a set-off.

[68] Secondly, the Federal Court in *Sime Diamond Leasing (M) Sdn. Bhd. v. JB Precision Moulding Industries Sdn. Bhd. (In Liquidation)* [1998] 4 CLJ 557 held that "For the statutory set-of provisions to apply, the circumstances of a case must disclose mutual credits, mutual debits or other mutual dealings. The prerequisite of mutual dealings requires that the cross-demands must be between the same parties, and be held in the same capacity or right".

[69] Further, in explaining what "mutual dealings" encompasses, the Federal Court referred to the case of *Hilev v. Peoples Prudential Assurance Co. Ltd. (In liquidation)* [1938] 60 CLR 468 that "mutual dealings exist which involve rights and obligations whether absolute or contingent of such a nature that afterwards, in the event that happen, they mature or develop into pecuniary demand capable of set-off."

[70] In other words, the debtor must show a pecuniary debt which it can then set-off against the debt owed to the creditor whose monies it is holding.

[71] Here, no details have been provided by HSBC as to when or how the alleged loss of Credit Authorisation Terminals occurred. HSBC has also not provided any comprehensible details as to how the sum of RM18,877.39 arose or how it purported to be the loss and expenses incurred. Further, the documents referred to in exh. "GT3" of HSBC's affidavit in support affirmed on 11 July 2006 (encl. 2) are also incomplete. As such, the amount claimed cannot be ascertained for a fact as being due or as representing any mutual debts, credits or dealings between PHK and HSBC.

[72] The Singapore Court of Appeal in *Good Property Land Development Pte. Ltd. (In Liquidation) v. Societe-Generale* [1996] 2 SLR 239 at 246 held that for mutuality to exist, two (2) conditions must be satisfied, namely:

(i) each claimant must be personally liable for the debt he owed to the other claimant; and

(ii) each claimant must beneficially own the claim which was owed to him by the other claimant and his ownership interest in that claim must be clear and ascertained without inquiry.

[73] Accordingly, s. 41 of the Bankruptcy Act 1967 is not applicable here to entitle HSBC to retain the amount of RM18,877.39 and such amount should be paid to MTB together with the monies held in the suspense account. The rights of MTB to all the subject monies herein as secured creditor therefore must prevail over HSBC who is just another unsecured creditor in relation to the assets of PHK.

Conclusion

[74] To conclude the court reiterates that MTB is a secured creditor while the 3rd-29th defendants as well as HSBC are unsecured creditors in relation to the assets of PHK. Therefore, MTB's claim must prevail. MTB is entitled to all the Disputed Monies held by the liquidators and HSBC in both the present applications. It is now ordered that the Disputed Monies held by the liquidators as well as by HSBC (inclusive of the sum of RM18,877.39) be delivered forthwith to MTB. Each party to bear their own costs in the present applications.